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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-1060

KAREN CONDIT AND MARY E. ORAVEC,
Petitioners,

vs.

UNITED AIR LINES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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OPINIONS BELOW.

The memorandum opinion and order of the United States District Court is not officially reported, but is unofficially reported at 13 F. E. P. cases 689 (E. D. Va. 1976). The *per curiam* opinion of the Court of Appeals is reported at 558 F. 2d 1176 (4th Cir. 1977). Petitioners' petition to the Fourth Circuit for rehearing with suggestion for rehearing *en banc* was denied August 31, 1977.

JURISDICTION.

The jurisdiction of this Court was timely invoked by Petitioners under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

The questions presented by the Petitioners are as follows:

"1. Whether an airline can justify its policy requiring every female flight attendant to take an unpaid maternity leave from the time that she learns of her pregnancy until a post-pregnancy medical examination satisfies the airline that she may return to duty, as a *bona fide* occupational qualification ("bfoq") under Section 703(e) of Title VII of the Civil Rights Act of 1964, as amended, or as a business necessity, by showing only that the challenged policy is "consistent with", rather than essential to, a legitimate business objective of the airline.

"2. Whether an employer can succeed on a bfoq or business necessity defense on the ground that safety requires the policy at issue when (a) the agency charged with regulating safety has determined that the policy is not necessary to ensure safety and (b) the employer itself has no empirical evidence or studies to justify the policy in terms of safety."

STATUTES.

Sections 703(a) and (e)(1) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(a) and (e)(1).

STATEMENT OF THE CASE.

United Air Lines, Inc. ("United" or the "Company"), an interstate common carrier by air, has long had a policy, in common with virtually all other air carriers, of requiring stewardesses to discontinue flying upon knowledge of pregnancy for reasons of safety. The rule applies only to stewardesses and does not apply to any other female employees of the Company. The policy, as it appears in the collective bargaining agreement between United and its stewardesses, reads as follows:

"A stewardess shall, upon knowledge of pregnancy, discontinue flying. Upon request, the Company shall grant

such stewardess a maternity leave of absence. Such stewardess must be available to return to active service as a stewardess within ninety (90) days following date of delivery unless additional time is deemed necessary by the Company's medical examiner. In no case shall such period to return exceed six (6) months. Return to active service is contingent on passing a Company physical examination. Such stewardess shall retain and accrue seniority during the leave of absence, however, she shall not accrue vacation or sick leave during the period of the leave and she shall not be eligible for sick leave benefits for time lost for pregnancy."

Petitioner Karen Condit is a former stewardess of United who became pregnant during her employment in 1972. In accordance with the policy quoted above, she was required to take a maternity leave when her pregnancy became known. After the birth of her child she voluntarily resigned in 1973 for reasons unrelated to this case.

Petitioner Mary E. Oravec is and has been employed by United as a stewardess. During the course of her employment in 1972, she also became pregnant and was required to take a maternity leave during the period of her pregnancy. After her pregnancy ended, she returned to flight status and continues in that status to date.

Each of the two Petitioner stewardesses subsequently filed charges with the Equal Employment Opportunity Commission ("EEOC") alleging, *inter alia,* that United violated Title VII of the Civil Rights Act of 1964 ("Act") by requiring them to take maternity leaves upon knowledge of pregnancy. Petitioner Condit, after receipt of a right-to-sue letter from the EEOC, filed a class action suit in the U. S. District Court for the Eastern District of Virginia on May 6, 1974 based upon her charge. Petitioner Oravec intervened as a named plaintiff in the suit in September, 1974. On January 22, 1975, the District Court certified the action as a class action with respect to all female flight attendants now employed by United or so employed at any time beginning on March 19, 1972.

Trial on the issue of whether United's maternity leave policy was justified as a *bona fide* occupational qualification under Section 703(e) of Title VII took place before the District Court on October 28, 1975. Trial was resumed on November 26, 1975 for the introduction of the testimony of United's chief medical officer, who had been unavailable on October 28.

During the course of the trial, the District Court heard the testimony of three medical experts and the testimony of United's chief in-flight safety officer. Additionally, the court had before it the deposition testimony of another medical expert, a stipulation of facts and numerous exhibits. Post hearing briefs were filed by both parties.

On September 3, 1976, the District Court issued its Memorandum Opinion and Order in which it reviewed the evidence and arguments placed before it by the parties and concluded, based upon this evidence and these arguments, that (Appendix to Petition, p. 21a):

> "United has clearly shown by the record here made that its mandatory maternity leave policy has a manifest relationship to the continuing employment of stewardesses during their pregnancy.
>
> The safety of the passengers must come first—in case of doubt, that doubt must be resolved in favor of the passengers—Airlines must take no chances when it comes to safety.
>
> Taking into account the total pregnancy picture as here shown, United is justified in enforcing its mandatory maternity leave policy as a bona fide occupational qualification for the continued employment of stewardesses during their pregnancy."

Petitioners appealed the District Court's decision to the U. S. Court of Appeals for the Fourth Circuit where briefs were filed and oral arguments were presented. On July 28, 1977, the Fourth Circuit, in a *per curiam* decision, affirmed the decision of the District Court. The Fourth Circuit's decision reads in full as follows (558 F. 2d 1176):

"PER CURIAM:

Karen Condit, a stewardess representing a class composed of herself and all others similarly situated, and Mary E. Oravec, an intervenor, appeal from an order of the district court holding that the maternity leave policy of United Air Lines, Inc., constitutes a bona fide occupational qualification under § 703(e) of Title VII of the Civil Rights Act of 1964, as amended (42 U. S. C. § 2000e-2(e)). We affirm.

United requires that all stewardesses discontinue flying as soon as they become aware that they are pregnant. The stewardesses contend that each stewardess should be allowed to continue working as long as she can safely perform her duties.

The district court found, on conflicting expert testimony, that pregnancy could incapacitate a stewardess in ways that might threaten the safe operation of aircraft. It therefore concluded that United's policy of refusing to allow stewardesses to fly from the time they learned they were pregnant was consistent with a common carrier's duty to exercise the highest degree of care for the safety of its passengers. [Footnote omitted.]

The district court's ruling that United's policy is a bona fide occupational qualification is based on findings of fact which, on the evidence presented by this record, are not clearly erroneous. Fed. R. Civ. P. 52(a). Accordingly, the judgment is affirmed."

Petitioners petitioned the Fourth Circuit for a rehearing with a suggestion for rehearing *en banc*. This petition was denied. Thereafter, on January 27, 1978, Petitioners requested this Court to grant certiorari.

REASONS FOR DENYING THE PETITION.

The issue of whether a practice or policy of an employer constitutes a "*bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" within the meaning of Section 703(e) of Title VII

is an issue of *fact* to be decided by the trial court. In the instant case, after a full and complete trial, and for the reasons set forth at length in the trial court's decision, the court found that United's policy of requiring stewardesses to take a maternity leave upon knowledge of pregnancy was justified as a *bona fide* occupational qualification under Section 703(e). Inasmuch as the trial court's decision was based upon the evidence presented to it and involved an issue of fact and not an issue of law, its decision properly lies within its area of competency.

Rule 52(a) of the Federal Rules of Civil Procedures provides that:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge the credibility of the witnesses."

Based on Rule 52(a), the Fourth Circuit found that the trial court's decision was not "clearly erroneous" and properly refused to set aside the judgment of the trial court.

It is not the policy of this Court to sit in the position of the trial court. As this Court concisely stated in *New Haven Inclusion Cases*, 399 U. S. 392, 435 (1970):

> ". . . It is not for us to pass upon the myriad factual and legal issues as though we were trying the cases *de novo*. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end."

Inasmuch as there has been a full trial on the factual question of whether United's practice of requiring stewardesses to discontinue flying when pregnant constitutes a *bona fide* occupational qualification within the meaning of Section 703(e) of the Act, and there has been a factual finding based on the evidence, there is no proper basis for review by this Court.

In their construction of the two questions at issue, Petitioners endeavor to persuade this Court that certiorari should be granted

because the lower courts allegedly used the wrong standard for determining whether a *bona fide* occupational qualification exists. Thus, in question one, Petitioners imply that the decision of the trial court below was based simply on a showing by United that the challenged policy is only "consistent with", rather than essential to, a legitimate business objective of the carrier.

The fact is the District Court's decision did not rest on the standard asserted by the Petitioners. As reference to the comprehensive decision of the District Court itself shows, the decision of that Court rested on the showing made by United that it is obligated by Section 601(b) of the Federal Aviation Act, 49 U. S. C. 1421(b), to perform its services with the "highest possible degree of safety in the public interest" and that the primary business objective of United is to transport passengers safely from one point to another. After hearing medical and operational evidence concerning the role of stewardesses in meeting this objective, the District Court correctly ruled that United's policy met the requirements of Section 703(e) of the Act in that the practice was reasonably necessary to the operation of the business.

In affirming the decision of the District Court, the Fourth Circuit characterized the District Court's decision as one which:

> ". . . concluded that United's policy of refusing to allow stewardesses to fly from the time they learned they were pregnant was consistent with a common carrier's duty to exercise the highest degree of care for the safety of its passengers." (558 F. 2d at 1176.)

This characterization of the District Court's decision does not, of course, change the actual standard used by the District Court in arriving at its decision, which is set forth in that decision itself, but is merely an abbreviated description of the general nature of the decision. Since an examination of the District Court's decision will establish it was based on the correct standard, the Petitioners' endeavor to persuade this Court to the contrary must fail.

Petitioners, in their phrasing of the second question presented for review, urge this Court to consider whether an employer can succeed in establishing a *bona fide* occupational qualification "when the agency charged with regulating safety has determined that the policy is not necessary to ensure safety" and the employer itself has no empirical evidence or studies to justify the policy in terms of safety.

The short answer to Petitioners' second question is that the Federal Aviation Act imposes the duty of exercising the highest degree of safety in the transportation of passengers directly on the air carrier, not on a federal agency. In the case at hand, the federal agency here involved (Federal Aviation Administration) has promulgated no health or physical standards at all for stewardesses since those standards are imposed by the carriers on whom the duty of safety rests. With respect to the absence of "empirical evidence or studies" to justify the policy, the short answer to this assertion is that United cannot risk the safety of its passengers by experimenting with continued employment of pregnant stewardesses any more than it can risk the safety of passengers by permitting pilots to continue flying when there is a risk of incapacitation.

Finally, this Court's Rule 19 sets forth the general considerations governing the granting of petitions for writs of certiorari and none of the considerations are present in this case. No state court decision is involved interpreting a federal question of substance; there is no conflict between the U. S. Circuit Courts of Appeal; no state or territorial question is involved; no important question of federal law which should be settled by this Court is involved; no federal question which is in conflict with applicable decisions of this Court is involved and there has been no departure from the accepted and usual course of judicial proceedings, or sanctioning of such proceedings, as to call for an exercise of this Court's power of supervision.

As stated many years ago by this Court in the decision in *Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387, 393 (1923):

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from the parties, and in cases where there is a real and embarassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case comes under neither head."

So, too, the decision here involved is not one which is of importance to the public, nor is there any conflict in the Circuits. The effect of the petition in this case is simply to have this Court substitute its judgment for that of the trial court as to factual matters properly within the trial court's domain.

Wherefore, United respectfully requests this Court to deny the petition.

Respectfully submitted,

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